SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS

Petitioner,

vs.

THE STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF.

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No. 874

FRANK ANDREWS

Petitioner,

vs.

THE STATE OF OHIO,

Respondent

PETITION FOR A WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

(a) Summary Statement of Matter Involved

The Grand Jury of Hamilton County, Ohio, at the January, 1945 term of court returned an indictment reading as follows:

> "That Frank Andrews, alias Frank Andriello, alias Screw Andrews on or about the 29th day of December in the year nineteen hundred forty-four at the County of Hamilton and State of Ohio, aforesaid, *did unlawfully promote and carry on a scheme of chance known as 'policy' or 'number game'*, he, the said Frank Andrews, alias Frank Andriello, alias Screw Andrews, then and there being a second offender by reason of his having been convicted of promoting a scheme of chance in violation of Section 13064-1 of the General Code of Ohio on the twentieth day of September in

the year nineteen hundred and forty-four in the Municipal Court of the City of Cincinnati, Ohio, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

On the back of said indictment was endorsed:

"Indictment for Vio. Sec. 13064-1 G. C."

The petitioner filed a motion to quash and a demurrer to said indictment on the grounds that said statute was unconstitutional in that it deprived him of his constitutional rights and denied due process under the Fourteenth Amendment of the United States Constitution in that said legislation was unconstitutional as is hereinafter shown.

Said motion and demurrer were overruled by the Trial court and on the trial of said indictment the jury returned a verdict finding the defendant guilty at which time the court passed sentence of one to seven years in prison in the Penitentiary and a fine of One Thousand Dollars.

(b) Reason Relied On for the Allowance of the Writ

Petitioner contends that the trial court should have granted his motion to quash and the demurrer to the indictment. The indictment charged that the defendant "did unlawfully promote and carry on a scheme of chance * * *." The Prosecuting Attorney noted on the back of the indictment "vio. sec. 13064-1 G. C."

Said Sections 13064 and 13064-1 read as follows:

Section 13064—Penalty for Promoting Lottery or Scheme of Chance.

Whoever *for his own profit, establishes, opens sets on foot, carries on, promotes,* makes, draws or acts as "backer" or "vender" for or on account of a lottery

or *scheme of chance, by whatever name, style or title denominated or known,* whether located or to be drawn, paid or carried on within or without this state, or by any of such means, sells or exposes for sale anything of value, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than six months.

SECTION 13064-1—PENALTY FOR ESTABLISHING, PROMOTING, ETC. "NUMBERS GAME," ETC.

Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws or acts as "backer" of "vender" for or on account of a *scheme of chance* known as "policy", "numbers game", "clearing house" or by words or terms of similar import, whether located or to be drawn, paid or carried or within or without this state, or by any of such means, sells or exposes for sale anything of value shall, upon first conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than six months nor more than ten months, and upon the second or succeeding convictions shall be fined not less than five hundred dollars nor more than one thousand dollars and imprisoned in the penitentiary not less than one year nor more than seven years.

We now direct the Court's attention to the fact that Section 13064 and 13064-1 as applied to the present defendant are unconstitutional. These sections of the Code along with Section 13063 and 13063-1 were all included in the Substitute House Bill No. 384 which was passed by the House of Representatives and sent to the Senate on April 29th, 1943. These bills were amended in the Senate by inserting the words "for his own profit" into *Sections* 13063 and 13064 and in such amended form were passed by the Senate on May 26th, 1943, and concurred in by the House on May 28th, 1943, and approved by the Governor on June 22nd, 1943, becoming effective September 21st,

1943 (See 120 Ohio Senate Journal 517, 647, 714 and 754).

From the Legislative History it is evident that Sections 13064 and 13064-1 were passed at one and the same time as one complete Legislative Act and not 13064-1 as an additional, amendment or substitution for 13064.

With that idea in mind we examine the two sections and find that 13064 has the following language:

> "whoever * * * promotes * * * scheme of chance by whatever name, style or title denominated or known * * *."

We then look at Section 13064-1 which provides:

> "Whoever * * * promotes * * * scheme of chance known as 'policy' and 'numbers game' or by words or terms of similar import."

In the first Section provision is made for a fine of some $50.00 to $500.00 and imprisonment from ten days to six months. In the next Section provisions are made for a fine $50.00 to $500.00 and imprisonment of not less than six months or more than ten months and upon a second conviction from $500.00 to $1,000.00 fine and not less than one year or more than seven years in the penitentiary.

In the instant case the accusation made against the defendant is just as fully covered under Section 13064 as it is under Section 13064-1. The question then presented is where two sections of the code are passed simultaneously each of which describes a certain act of conduct as constituting an offense and the penalty is more severe in one than in the other, can such legislation be sustained when in effect it permits the prosecuting attorney to discriminate against a defendant and thus make the law unequal in its application?

The term covered in Section 13064 "scheme of chance by whatever name, style or title denominated or known"

certainly includes the terms used in Section 13064-1. "Scheme of chance known as 'policy' 'numbers' game, clearing house or by words or terms of similar import.

The legislation is defective for another reason, in that while both Sections describe the same offense, under Section 13064 the State is required to prove that the Act was committed "for his own profit", which term was inserted by the Legislature when it was in the Senate, but a similar term is not included in Section 13064-1. If the Act the defendant was charged with was included in the offense described under Section 13064 then under said Section the State would be required to prove that such Act was done "for his own profit" while under Section 13064-1 if selected by the Prosecuting Attorney the burden of the State would be made easier.

It is evident that the offense charged in the indictment, if it be an offense, is covered by the first section, that is 13064, and is fully described therein.

The last Section 13064-1 undertakes to cover the same offense with a greater penalty.

Where the Legislature passes two sections defining and establishing the same crime and imposes a lighter penalty in one and a heavier penalty in the other, it deprives the accused of his rights when the Prosecuting Attorney in effect is given the choice of under what statute he will prosecute the defendant. It permits the Prosecuting Attorney to discriminate in favor of or against an accused. It, therefore, makes the legislation unequal in its application to persons and results in a deprivation of the accused's constitutional rights and a denial of due process under the 14th Amendment of the United States Constitution. (In re: Cooper, 134 O. S. 40, 11 O. O. 442).

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of

this Honorable Court directed to the Supreme Court of Ohio commanding that court to certify and send to this Court for its review and determination on the day therein named a full and complete transcript of the record and all proceedings in the case numbered and entered on its docket as No. 30487 The State of Ohio, plaintiff-appellee v. Frank Andrews, defendant-appellant, and that the said judgment entered by it on October 31, 1945 and the order of said court overruling the application for a rehearing entered on November 21st, 1945 wherein it overruled a Motion to Certify the record to the court for review and dismissed the appeal filed as a matter of right, may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FRANK ANDREWS,
By SOL GOODMAN,
By WM. F. HOPKINS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

No opinion in the herein cause was rendered by any of the lower courts.

II

Jurisdiction

The jurisdiction of this Court to entertain a petition for a writ of certiorari and the allowance thereof is provided for in Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Statutes 937, particularly Section 237 (a) (b).

The date of the judgment and decree to be reviewed is October 31st, 1945, together with the overruling of an application for rehearing by the Supreme Court of Ohio on November 21st, 1945.

The jurisdiction of this Court is sustained by Rule 38, Section 5 (a) and (b), see also *Matthews* v. *Huwe,* 269 U. S. 262; *Cuyahoga River Co.* v. *Northern Realty Co.,* 244 U. S. 300; *Williams* v. *Heard,* 140 U. S. 529; *Rector* v. *City Bank Co.,* 200 U. S. 405; and *Eau Claire National Bank* v. *Jackman,* 204 U. S. 522.

III

Statement of the Case

The petition for a Writ of Certiorari shows that Frank Andrews was indicted and convicted under General Code of Ohio Section 13064-1 of the offense of "promoting and carrying on a scheme of chance."

The State of Ohio at the same time enacted two statutes covering the subject of "promoting a scheme of chance" and under one statute made it an offense if carried on for "one's own profit" and under the other statute made it an offense whether or not for one's own profit. The legislative purpose was to permit the carrying on of a scheme of chance and gambling by charitable and religious organizations, or by individuals for charity's sake. So as to properly distinguish (or as we call it discriminate) the legislature adopted this scheme by means of two statutes. In the present case the accused was neither charged with nor was any effort made to show that he promoted a scheme of chance for his own profit. He was convicted and sentenced the maximum penalty provided by the harsher of the two statutes.

IV

Specification of Errors

The trial court erred in overruling the motion to quash the indictment and the demurrer to the indictment and the accused's motion to dismiss him. The Court of Appeals and the Supreme Court of Ohio committed error in affirming the action of the trial court.

V

Argument

The facts as outlined above present this simple proposition of law.

MAY THE STATE OF OHIO ENACT TWO STATUTES OF THE CODE, UNDER ONE OF WHICH IT EFFECTUATES A POLICY OF CHARITABLE GAMBLING, AND UNDER THE OTHER IT PENALIZES GAMBLING OTHER THAN CHARITABLE? UNDER SUCH LEGISLATION CAN THE PROSECUTING ATTORNEY HAVE THE POWER OF SELECTING UNDER WHICH SECTION OF THE CODE TO PROCEED, AND OBTAIN A CONVICTION AGAINST AN ACCUSED?

The petition under the heading "Reasons Relied on For the Allowance of Writ" sets forth the history and language of the two Sections of the Code. We direct the Honorable Court's attention first to the decisions in the State of Ohio and then to the decision by this Court covering the law applicable to this situation.

Of course, in Ohio we only have statutory offenses. *State* v. *Rose*, 89 Ohio State, 383 at page 386:

> "Since we have no common-law crime in the State of Ohio, we must look to the Statutes for the declaration and definition of a crime."

The making of an act a crime must be of uniform application throughout the State and in the same manner uniform in its application, to all persons. *State* v. *O'Mara,* 105 O. S. 94 Syl. 1:

> "The power to define and classify and prescribe punishment for felonies committed within the State is lodged in the general assembly of the State, and when so defined, classified and prescribed, such laws must have uniform operation throughout the State."

In the present case no less stringent restrictions can be placed on one class of people under Section 13064 of the General Code and more stringent provisions as against another class of people under Section 13064-1. Both sections, if they define the same offense, must apply to all people equally. If on the other hand one Statute permits what the other Statute prohibits, then no prosecution can be had under the prohibitory Statute. *Toledo Disposal Company* v. *Ohio,* 89 O. S. 230:

> "No criminal prosecution can be sustained in Ohio except for an act done in violation of a statute or ordinance legally passed; and the courts will not construe that to be a crime punishable under one statute which was done under authority especially granted by another statute."

Of course, a criminal statute must be construed strictly and against the State. See *Rogers* v. *State,* 87 O. S. page 312:

> "It is elementary, in construing statutes defining crimes and criminal procedure, that they must be strictly construed, reasonably, of course, but still strictly. The criminal statutes of Ohio having specially excluded certain foregoing sections from the requirement of filing an information by the Prosecuting Attorney, it must be presumed that as to all other

sections upon which criminal prosecutions in the Probate Court are founded, they still must follow the general rule."

We direct the court's attention to the rule laid down in *State* v. *Meyer,* 56 O. S. 340 and which is approved in *State* v. *Krauss,* 114 O. S. at page 348:

> "A statute defining a crime or offense cannot be extended, by construction, to persons or things not within its descriptive terms, though they appear to be within the reason and spirit of the statute."

In the *Krauss* case the court concluded *on page 350* as follows:

> "In the case at bar the intent of the defendant to keep the machine as a gaming device for gain is of the essence of the offense, which might be shown under certain conditions by redeeming the checks won by the player, thus bringing something of value to the player for nothing which might appeal to the gambling instinct.
>
> "In the light of the meager record presented in this case, we are unable to find that the State showed beyond the existence of a reasonable doubt the essential elements going to make up the offense charged, and we are, therefore, led to the same conclusion reached by the Common Pleas Court and the Court of Appeals, to-wit, that the record does not show sufficient to sustain the judgment of the Justice of the Peace."

From a consideration of the above authorities it must be evident that the Legislation under which the defendant in this case was prosecuted was improper. We further contend that if the two Sections of the Code, passed simultaneously, permit the operation of a scheme of chance "without profit" and thus license a certain act while at the same time prohibit the same act in the next Statute, such

legislation definitely is unequal in its application, and, therefore, is unconstitutional. No matter what may have been in the mind of the Legislature, whether it had a desire to permit "charitable" gambling and prohibit other gambling, of if it desired to effectuate a policy as shown in the argument of the Prosecuting Attorney wherein he said:

> "I don't think a penny-ante game in somebody's cellar is our business. Probably I should not say that as the Prosecutor of this County."

Notwithstanding such legislative policies, it clashes directly with the provisions of the Constitution of our State which provides under Article XV, Section 6:

> "Lotteries and the sale of lottery tickets for any purpose whatsoever, shall forever be prohibited in this State."

We cannot, therefore, say that Section 13064 undertook to license or permit all gambling if engaged in not "for his own profit," while Section 13064 prohibited all gambling whether engaged in for profit or otherwise. Without the passage of either one of the two Sections no offense could be committed. Can it then be said that the defendant in this case is to serve a term in the Penitentiary because the Prosecutor noted on the indictment that it was a violation of Section 13064-1, but could not be held or convicted of any crime (there being no proof that he conducted game for his own profit); if the prosecutor had noted on the indictment that it was a violation of Section 13064? Are the liberties of citizens to hang upon such a thin thread as the whim and fancy of a Prosecutor?

In line with the decisions of this Court, pointing out that a Legislative body cannot permit what the constitution prohibits, and perhaps to put it more clearly, cannot give

an exemption from crime to one group while impose a penalty on the other, we direct the court's attention to the case of *Seattle* v. *Chin Let,* 19 Wash. 38, wherein the court held that the exception of charities from lottery statute is invalid.

On the proposition that a statute must have equal application we direct your attention to the following authorities:

The Supreme Court of the United States in the case of *Frost* v. *Corporation Commission,* 278 U. S. 515, Mr. Justice Sutherland delivered the opinion of the court and said in part:

> "Mere difference is not enough; the attempted classification must always rest on some difference which bears reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, badly creates one rule for a natural person and a different and contrary rule for an artificial person notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits, it produces a classification which subjects one to the burden of showing a public necessity for his business from which it relieves the other and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation."

And in *Barbier* v. *Connolly,* 113 U. S. 923, Mr. Justice Field said in part:

> "That no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and that in the administration of criminal justice no different or higher punishment should be

imposed upon one than such as is prescribed to all for like offenses" and

"Class legislation, discriminating against some and favoring others, is prohibited."

In the case of *Connolly, et al.* v. *Union Sewer Piper Co.* reported in 184 U. S. 679, it was held:

"Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis * * * But arbitrary selection can never be justified by calling it classification."

These principles were recognized and applied in *Cotting* v. *Kansas City Stock Yards,* 183 U. S. 92, where it was unanimously agreed;

"That a statute of Kansas regulating the charges of a particular stock yard company in the State, but which exempted certain stock yards from its operation was repugnant to the 14th Amendment in that it denied to that company the equal protection of the laws in prescribing regulations for the conduct of trade and it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity."

And then in *Tigner* v. *Texas,* 310 U. S. 141, it was held:

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

In the case of *Skinner* v. *Oklahoma,* 316 U. S. 535, it was held:

"When the law lays an unequal hand on those who have committed intrinsically the same quality of offense

> and sterilizes one and not the other, it has made an invidious discrimination as if it had selected a particular race or nationality for oppressive treatment."

In the case of *State* v. *Gardner*, 58 O. S. 599, it was held:

> "A law which requires every plumber to undergo examination and obtain a license, but permits all members of a firm to pursue the business where one only has procured such license, does not operate equally upon all of a class, and is invalid."

And in *State ex rel. Hostetter* v. *Hunt*, 132 O. S. 568, the Court held:

> "A statute which confers special benefits upon delinquent taxpayers not equally available to non-delinquent taxpayers violates Article I Section 2 of the Constitution of Ohio, and is therefore void and of no effect."

The court in *Xenia* v. *Schmidt*, 101 O. S. 437, said:

> "The classification must not be arbitrary, artificial, or evasive, but there must be a real and substantial distinction in the nature or classes upon which the law operates."

Summary of the Argument

The decision of the courts is contrary to and in conflict with prior Federal and State court decisions as is evident from the authorities cited in the brief. The accused finds himself in the position facing a term in the Penitentiary and a fine by reason of his conviction under a statute which makes a certain act a crime, while at the same time another statute of the State permits the doing of the same act. Under such circumstances this Honorable Court should take cognizance of this case, order a Writ of Certiorari, review it, and announce the principles of law which should be properly applied thereto.

Conclusion

It is respectfully submitted that this case is one calling for the intervention by this Court of its supervisory power in order that

(a) the decision by the State Court sustaining a State Statute which is in conflict with the Constitution of the State of Ohio and the Constitution of the United States of America and

(b) An important question of general law having been decided in a way probably erroneously and in conflict with the weight of authorities and

(c) The State Court having decided the question in a way probably in conflict with prior decision of this Court; it may be properly reviewed and to such an end a Writ should be granted and this Court should review the decision of the Supreme Court of Ohio and finally reverse it.

Sol Goodman,
Wm. F. Hopkins,
Attorneys for Petitioner.

No. 374

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

October Term, 1948.

FRANK ANDREWS,

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vs.

THE STATE OF OHIO,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT CERTIORARI.

I.

HISTORY OF THE CASE.

The Grand Jury of Hamilton County, Ohio, at the January, 1945 Term of Court returned an indictment reading as follows:

> "That Frank Andrews, alias Frank Andriello, alias Screw Andrews on or about the 29th day of December in the year nineteen hundred forty-four at the County of Hamilton and State of Ohio, aforesaid, did unlawfully promote and carry on a scheme of chance known as 'policy' or 'numbers game', he, the said Frank Andrews, alias Frank Andriello, alias Screw Andrews, then and

there being a second offender by reason of having been convicted of promoting a scheme of chance in violation of Section 13064-1 of the General Code of Ohio on the twentieth day of September in the year nineteen hundred and forty-four in the Municipal Court of the City of Cincinnati, Ohio, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

To this indictment the Defendant entered a plea of not guilty and after a Demurrer and Motion to Quash had been overruled, the cause proceeded to trial before Honorable Nelson Schwab, of the Hamilton County, Ohio, Court of Common Pleas, and a jury.

On March 14, 1945, the jury returned a verdict finding the Defendant guilty as charged. A Motion for a New Trial was seasonably filed and, upon argument by counsel, was overruled and the Defendant sentenced in accordance with the statute.

The case was reviewed by the Court of Appeals for the First Appellate District of Ohio, which affirmed the judgment of the trial Court and the Supreme Court of Ohio, after the submission of briefs and the hearing of oral arguments, overruled a Motion to Certify the Record. The case is now before this Court upon an Application by the Defendant for a Writ of Certiorari.

II.

THE FACTS

The facts, as developed by the State show that the Defendant, Andrews, was a gambler by profession; that he had a criminal record; that for some time prior to De-

cember 29, 1944, he had operated a numbers or policy ring in the City of Cincinnati; that the game called numbers or policy is a scheme of chance in which the player or bettor selects a series of three numbers and deposits a wager on these numbers with a "writer". The writer makes out a slip in triplicate containing the numbers selected, the symbol of the writer, the amount wagered and some means of identifying the player. One of the slips is given to the player, another kept by the writer and the third turned over with the bets to a "runner", who collects from a number of writers and turns the slips and money in at a clearing house presided over by the "promoter" or his employes. The winning number for any particular day is the middle three digits of the total number of shares of stock sold on the New York Stock Exchange for that day and the winners are paid on a basis of five hundred to one, less 10% of such winnings which go to the writer. (The odds against winning are, of course, one thousand to one).

The evidence further showed that one of the rules of the game is that when the police confiscate the slips from any runner, the backer or promoter is excused from paying any bets recorded on such slips. This rule becomes important in the light of the conduct of the Defendant as hereinafter set forth.

In August, 1944, the Defendant's headquarters or clearing house on Boone Street, Cincinnati, Ohio, was raided and the Defendant charged with violating Section 13064-1 of the General Code, as a first offender. He pleaded guilty to this charge on September 20, 1944, in the Municipal Court of Cincinnati, Ohio, and paid the fine which was assessed against him.

The Defendant claimed at the trial that after this conviction he sold out his numbers business to his brother,

Dan Andrews, who continued to operate it in Norwood, Ohio, but the evidence showed that all monies taken in by the business were deposited in a bank account in the name of the Defendant and his former partner, Maria Red, and no funds could be withdrawn from this account without the Defendant's signature, thus proving beyond all doubt that Defendant continued to control the business.

On December 29th, 1944, number 000 was the winning number and since this was a very popular number with the players, Andrews decided to take advantage of the rule that when the slips were seized by the police the house was not obliged to pay off. Accordingly, he personally went to the Cincinnati Police Department on that day and arranged to have his runner, Iaccobucci, picked up. He not only told the police where Iaccobucci was, but personally took a detective to the street corner where Iaccobucci was seated in the Defendant's own car with the slips for that day.

The Defendant never, at any time, denied that he operated a numbers ring. In fact, he bragged of the amounts he had paid to winners, amounting to forty thousand or fifty thousand dollars in approximately seven months (See R. p. 96). He merely claimed that he had sold the business to his brother on the day following his first conviction in September, 1944.

However, when confronted with his own bank account, he was forced to admit that he continued to deposit money from the numbers business in the account and signed checks against it long after that time (R. pp. 102 and 103). The truth of the matter was quite apparent to all who heard the evidence, including the jury. After his first conviction, the Defendant was afraid to keep the business in his own name for fear of being charged as a second

offender. However, he was also afraid to trust either his own brother or Iaccobucci, whom he had hired as "front men", with the money and this lead to his undoing.

As added evidence that he had not quit the numbers business, the State introduced testimony of two of his writers, William Crane (R. p. 14) and Roy Bieler (R. p. 30), who stated that they were writing numbers for the Defendant on December 29th, 1944, the date named in the indictment. These witnesses even identified slips which the police found in the possession of Iaccobucci on December 29, as slips which they personally had written for the Defendant on that day.

The witness Cleaver M. Hoard (R. p. 37) testified that she played the number 250 on December 20, 1944, with one of the Defendant's writers; that the number won on that day and that she was not paid. This was the day that the Norwood Clearing House was raided. Several days later the writer, Crane, came to her home with the Defendant, Andrews, and Andrews informed her that he was running the business in Norwood; that the place had been raided on December 20th and that under the rules of the game he did not have to pay any winners. He did, however, condescend to give her a present of $25.00 upon her promise that she would continue to patronize his ring. Miss Hoard further testified that she did continue to patronize the Defendant's ring and that she played the winning number 000, on December 29th and again was not paid.

A number of other witnesses testified in the same vein and the jury could not help but come to the conclusion that Andrews not only operated a numbers ring on December 29th, 1944, but that he was too crooked to pay off when he lost.

III.

ARGUMENT.

The Defendant's Application for a Writ of Certiorari is based entirely on his contention that Section 13064-1 of the General Code of Ohio, under which he was indicted, tried and convicted, is unconstitutional.

Prior to September 21, 1943, Section 13064 of the General Code of Ohio read as follows:

> "Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws or acts as 'backer' or 'vendor' for or on account of or is in any way concerned in a lottery, 'policy', or scheme of chance, by whatever name, style, or title denominated or known, whether located or to be drawn, paid or carried on within or without this state, or by any of such means, sells or exposes for sale anything of value, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

In 1943 the Ohio Legislature amended this section by inserting the phrase "for his own profit" and enacted a new section, i. e. 13064-1, dealing particularly with the offense of promoting "policy or numbers game" and reading as follows:

> "Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws, or acts as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy', 'numbers game', 'clearing house' or by words or terms of similar import whether located or to be drawn, paid or carried on within or without this state, or by any

such means, sells or exposes for sale anything of value shall, upon first conviction thereof, be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than six months, nor more than ten months, and upon second or succeeding convictions shall be fined not less than five hundred dollars nor more than one thousand dollars and imprisoned in the penitentiary not less than one year nor more than seven years."

Counsel for Defendant contend that Section 13064, Ohio General Code, as amended, is unconstitutional.

We see no point in debating this question as it is entirely irrelevant to the issues of this case. Even if this Court were to determine that Section 13064, as amended, is unconstitutional, such a determination would have no bearing on the constitutionality of Section 13064-1. The fact that both sections were enacted at the same time has nothing whatever to do with the case and no violator of Section 13064-1 may be comforted by the fact that Section 13064 may be unconstitutional.

Counsel for the Defendant complain because Section 13064 General Code, which makes it an offense to promote a scheme of chance by whatever name, style or denomination known, provides a lesser penalty than Section 13064-1 which deals particularly with the promotion of the policy or numbers game. They also contend that the offense charged in the indictment here under Section 13064-1 might also have been charged under Section 13064.

We should like to call the Court's attention to the Ohio larceny section (No. 12447) which provides that whoever steals anything of the value of more than $35.00 may be imprisoned not less than one nor more than seven years.

The horse stealing section (No. 12448) provides that whoever steals a horse of whatever value may be imprisoned not less than one nor more than fifteen years; and the automobile stealing section (No. 12619) provides a penalty of one to twenty years imprisonment for the theft of a motor vehicle, without regard to value. This latter section further provides a penalty of five to thirty years imprisonment for a second or subsequent offense. Both horse stealing and auto stealing are larceny and yet our State Legislature and the Legislatures of practically all other states, have seen fit to provide more severe penalties for the stealing of these particular items of property without regard to their value. So in this case the Legislature has seen fit to provide a more severe penalty for the promotion of a particular kind of gambling game (numbers or policy) without regard to personal gain. It is obvious that the Legislature, in the exercise of its proper police powers, considered this particular form of gambling to be more detrimental to the public good than other forms of gambling.

We do not see how it can be reasonably argued that the Legislature of Ohio, in the exercise of its police powers in enacting the anti-numbers racket statute, could be said to have unreasonably invaded the Defendant's rights under the federal Constitution. The clause of the Fourteenth Amendment forbidding any State to deny any person within its jurisdiction the equal protection of the laws, does not limit and was not designed to limit the police power of the State, nor does it affect the proper exercise of such power. *People* v. *Havnor*, 149 N. Y. 195 (43 N. E. 541) *writ of error dismissed in* 170 U. S. 408.

The equal protection clause of the Federal Constitution does not take from the State the power to classify, in the adoption of police laws, but admits of the exercise of a

wide scope of discretion in that regard and avoids only what is done without any reasonable basis and, therefore, is purely arbitrary. *Motlow* v. *State*, 125 Tenn. 547 (145 S. W. 177) *Writ of Error dismissed in* 239 U. S. 653.

No proposition of constitutional law is more firmly established than that the provisions of the Fourteenth Amendment do not operate as a limitation upon the police powers of the State to pass and enforce such laws as will inure to the health, morals and general welfare of the people. *Pacific Gas & Electric Co.* v. *Police Court*, 251 U. S. 22.

In enacting Section 13064-1 the Legislature of Ohio was seeking to stamp out a particularly vicious racket. If this Section did not apply equally to all persons within the jurisdiction of Ohio, it might be said to be violative of the equal protection clause of the Federal Constitution, but it does apply equally to all persons and, we submit, is a perfectly valid exercise of the police power of the State of Ohio.

Counsel for Defendant also argue that the Prosecutor might have noted on the indictment that it charged a violation of Section 13064 of the General Code. This is a specious argument because Section 13064-1 is the only section in the Ohio Code which provides a penalty for the specific offense of promoting the numbers game. Since the indictment is drawn in the very words of this section, it would not have mattered what section number was endorsed on the back of the indictment by the Prosecutor, or whether any number had been endorsed on the indictment. It would still have charged a violation of the only section it could have been drawn under, i. e., Section 13064-1. In any event, it is our opinion that the Prosecutor had no choice in the matter. Where an act is unlawful under a general statute, but also violates the pro-

visions of a special statute, it is the duty of the Grand Jury to indict under the special statute. In this case the charge was laid under the only statute which deals specifically with the type of gambling operation which the Defendant was promoting.

CONCLUSION.

In conclusion, we respectfully submit that the Defendant received a fair trial; that in enacting Section 13064-1 of the General Code, the Legislature of Ohio was exercising its valid police powers; and that the application for a Writ of Certiorari should be denied.

Respectfully submitted,

CARL W. RICH,
Prosecuting Attorney
CARSON HOY,
Assistant Prosecuting Attorney
Counsel for Respondent.

(10)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS,
Petitioner,

vs.

STATE OF OHIO,
Respondent

PETITION FOR REHEARING

SOL GOODMAN,
WM. F. HOPKINS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 874

FRANK ANDREWS,
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STATE OF OHIO,
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PETITION FOR REHEARING

Comes now petitioner and respectfully requests a rehearing in the herein cause on the grounds that the decision of the State court is discriminatory in that it has imposed a penalty upon petitioner for the doing of an act which under another statute is legalized when performed by other persons.

Petitioner in his petition for rehearing directs the Court's attention to the fact that he had not had the opportunity to reply to the brief filed by the State of Ohio in opposition to his petition for a writ of certiorari, and that said brief sets forth arguments and contentions which are wholly untenable.

The brief of respondent heretofore filed in this case cites authorities apparently sustaining its contention (page 8) that the Fourteenth Amendment to the federal Constitution

(a) permits a State under its police power to discriminate between persons in its statutory enactments and

(b) that a State is permitted to classify and discriminate between persons in the enactment of penal statutes and

(c) that the Fourteenth Amendment to the Federal Constitution in no way limits the police power of a State.

Petitioner contends that each of the three propositions of law are wrong and if given the opportunity on rehearing he would demonstrate said propositions of law to be erroneous.

See *Hillsborough Township* v. *Cromwell,* 90 S. Ct. L. Ed., page 301:

> The equal protection clause of the *Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment* by subjecting him to taxes not imposed on others of the same class. *The right is the right to equal treatment.*

Certainly, if this is true as to taxes, it applies with equal force to the personal liberties of the individual.

Article XIV, Section 1 of the Federal Constitution provides that "no State shall make or enforce laws which shall • • • denying to any person within its jurisdiction the equal protection of the law." In the present case the State of Ohio has enacted simultaneously Section 13064 of its Code which permits the operation of a *scheme of chance* if it is not done for one's own benefit and under Section 13064-1 makes it a penal offense to operate a *scheme of chance.* By the enactment of these two laws it further permits gambling for charitable purposes and such but penalizes gambling for profit. The prosecuting attorney has the choice of selecting under which Section a prosecution is to be instituted and in that manner he is effectively prosecuting one person and exempting from prosecution an-

other. Thus the law lays in unequal hands on different persons, such as is forbidden by the Federal Constitution. For an interesting historical background of the Sections of the Code involved in this case, we direct your attention to the decision in *State* v. *Simonian,* 77 Ohio Appellate Reports, where at page 212 it is stated:

> In the case of Section 13064, General Code, therefore, since the Legislature has provided no penalty for one who conducts a lottery or scheme of chance, where such lottery or scheme is not conducted for such person's 'own benefit' although the constitutional prohibition still remains, it is obvious that no criminal prosecution may be predicated upon such conduct, under such circumstances.

We also direct the court's attention to the decision in the case of *Hague* v. *Committee for Industrial Organization,* 307 U. S., wherein this Court held that the equal protection of the law provision is violated if public officials fail systematically to enforce the law equally against all members of a class affected by it.

In the case of *Fowler* v. *State,* 189 Ga. 733, that court stated that due process under the Fourteenth Amendment requires a State to frame its crime statutes so that those to whom they are addressed may know what standard of conduct it intends to be required. Under the statutes above referred to the defendant in this case certainly did not know that in order to avoid a prosecution he had to select a charity and turn over the profits of the operation to it.

This Court in the case of *Buchalter* v. *New York,* 319, U. S. 427, announced the rule that the due process clause of the Constitution required that action by a State must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

Going back for centuries in the history of common law as well as the law of our State and land a statute on defining

a criminal act has never undertaken to exempt some persons or groups from the application of the law to them. Theft has always been defined as the stealing and taking of property of another. The law has never condoned the acts of Robin Hood who has taken the property of the other for the benefit of the poor. Ohio in the present case seeks to set up just such a law which provides that if any one operates a scheme of chance for the benefit of the poor it is no crime, but if in the mind of the prosecuting officials the poor did not get such benefit, then he may be prosecuted.

We respectfully submit that the millions of citizens of the State of Ohio are entitled to have the opinion of this Honorable Court as to whether or not such a novel policy of the legislature can be sustained.

In the case above referred to by the Court of Appeals of Ohio, 77 Ohio App. at page 208, you will see that from the days of the Ordinances of 1787 to the final adoption of the Statutes involved in this case in 1943, throughout the history of the State of Ohio, there has never been enacted law which permitted the operation of a scheme of chance, if not done for one's own benefit.

Petitioner and his counsel represent that this petition for rehearing is not being made for the purpose of delay, and that it is directed to the discretion and attention of the court to the end that the court might reconsider its order therein wherein it denied his petition, and grant this petitioner a rehearing so that the decision of the State courts may be properly reviewed and finally reversed.

Sol Goodman,
Wm. F. Hopkins,
Counsel for Petitioner.